

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**

77-6105

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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IVAN S. FISHER,

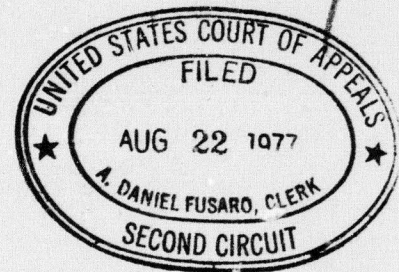
Plaintiff-Appellant,

- against -

UNITED STATES OF AMERICA,

Defendant-Appellee.
-----X

Docket No.
77-6105



ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR APPELLANT

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Statement Pursuant to Rule 28(a)

Preliminary Statement

Ivan S. Fisher, plaintiff in the court below,
appeals from a judgment and order entered on May 16, 1977
in the United States District Court for the Eastern District
of New York (Hon. John F. Dooling, Jr., J.) which granted
defendant United States of America's motion for summary

judgment, pursuant to Rule 56 of the Federal Rules of Civil Procedure, dismissing plaintiff's action. The decision of Judge Dooling has not yet been officially reported but has been reported at 77-2 U.S.T.C. ¶9499; the original Memorandum and Order is reproduced in Appellant's Appendix at A-4.

This is an action brought pursuant to 26 U.S.C. §7426 to recover from the United States for its wrongful levy against money in its possession in satisfaction of its jeopardy assessment in the amount of \$50,795.25 asserted to be due and owing as income tax from one Henry Gomez Londono pursuant to 26 U.S.C. §6851. The essence of plaintiff's claim is that he had, in fact, acquired all of Gomez Londono's right, title, and interest in the fund of money on which the Government had levied prior to its jeopardy assessment.

Plaintiff is a practicing attorney and a member of the Bar of the State of New York and this Court. In this capacity, he was retained by Henry Gomez Londono in connection with a criminal prosecution brought against him in the Eastern District of New York, United States v. Gomez Londono, 76 Cr. 153 (E.D.N.Y.).

Approximately \$56,000 in United States currency had been seized from Gomez Londono at Kennedy International

Airport on February 22, 1976, and, at the time plaintiff was retained by Gomez Londono as his attorney, this sum of money was then in the possession and at all relevant times thereafter continued to remain in the possession of the United States Customs Service.

On March 5, 1976, in a written assignment reproduced in Appellant's Appendix (A-58), Gomez Londono assigned all of his right, title, and interest in this money to Fisher as the bulk of the latter's fee for his representation of Gomez Londono in the then pending criminal proceedings.

On November 17, 1976, following oral argument upon a stipulated record, Judge Dooling of the Eastern District of New York, granted Gomez Londono's motion to suppress, inter alia, all evidence seized from his person and possession by agents of the United States Customs Service on February 22nd and 24th, 1976. United States v. Gomez Londono, 422 F. Supp. 519 (E.D.N.Y. 1976), rev'd, 553 F.2d 805 (2nd Cir. 1977).

On December 1, 1976, the Internal Revenue Service ("IRS") made and filed a jeopardy assessment in the amount of \$50,795.25 against Gomez Londono for income taxes purportedly due and owing. To satisfy the assessment, IRS

sought to levy against the approximately \$56,000 in United States currency which had been seized on February 22nd and 24th, 1976, and which was the subject both of the prior assignment from Gomez Londono to Fisher on March 5, 1976, as well as of the suppression motion granted in the District Court on November 17, 1976, but subsequently reversed by this Court, on April 18, 1977.

Id., 553 F.2d 805. Following the December 1, 1976 jeopardy assessment, the instant action was commenced by plaintiff in the court below.

The pleadings below are reproduced in Appellant's Appendix at A-19 through A-55. The Government sought and obtained depositions of plaintiff Fisher and Henry Gomez Londono. Both sides thereupon moved for summary judgment. On May 16, 1977, the District Court granted the Government's motion for summary judgment and denied plaintiff's motion for the same relief. From that judgment and order, plaintiff Ivan S. Fisher appeals.

Issue Presented for Review

Whether the District Court erred in granting the Government summary judgment on the basis of the Assignment of Claims Act, 31 U.S.C. §203.

Statement of the Case

A. Background and History: United States v. Henry Gomez Londono

In mid-February, 1976, agents of the federal Drug Enforcement Administration ("DEA") received information from a reliable Colombian informant to the effect that an individual named Henry Gomez Londono, a Colombian national, would be departing the United States on or about February 21-25, 1976, with approximately \$100,000 in United States currency for the purpose of consummating a narcotics transaction in Colombia. Agents of the United States Customs Service conducted an unsuccessful surveillance of Kennedy International Airport on February 21, 1976.

On the following day, however, February 22, 1976, Gomez Londono's presence at the Avianca Airlines departure area was reported to Customs agents by an employee of Pan American World Airways. As he walked toward the Avianca Departure Lounge, Gomez Londono was accosted by agents of the Customs Service and informed, for the first time, of the provisions of 31 U.S.C. §1101, which requires the making of a report of the international transportation of monetary instruments in excess of \$5,000.

Gomez Londono was asked if he was taking more than \$5,000 in currency out of the United States. He responded that he had \$900 in currency in his possession which he took from his pockets and exhibited to the agents. After being asked the same question on successive occasions, Gomez Londono removed an envelope from his jacket and handed it to the Customs agents, saying that he did not know its contents. The agents, observing something green through a bulge in the envelope, opened it and discovered approximately \$10,000 in United States currency, together with a photograph of Londono. At that point, Gomez Londono was arrested. A total of \$11,004.00 was seized from Gomez Londono's person.

It is important to note that, at the point of his interrogation and arrest, Gomez Londono had not yet checked himself in as a passenger, had not surrendered his ticket covering the journey from New York to Colombia, and had never, at any time, been provided with the relevant Customs form on which to declare the amount of monetary instruments he was transporting out of the United States. The relevant regulation, however, does not make the filing of the report obligatory until "the time of departure." 31 C.F.R. §103.25(b).

On February 24, 1976, Customs agents obtained a search warrant from a United States Magistrate for a search of Gomez Londono's luggage which had been removed from the Avianca aircraft shortly after his arrest. That search disclosed, inter alia, \$44,780.00 and two revolvers.

On March 2, 1976, Gomez Londono was indicted for making false statements to federal officers, in violation of 18 U.S.C. §1001; for an asserted violation of 31 U.S.C. §1101(b) in that the defendant allegedly transported, and caused to be transported, \$44,780 in United States currency without filing the form required by statute and the regulations promulgated pursuant to its authority; and, as well, for delivery of firearms to a common carrier for transportation without delivering the firearms to the custody of the pilot, in violation of 18 U.S.C. §922(e).*

In addition, on March 2, 1976, the Area Director of the United States Customs Service informed Gomez Londono in a letter -- ultimately returned as non-deliverable -- that he had "incurred the forfeiture of \$11,004 pursuant

* The sum of money -- \$44,780 -- which was the subject of the second count of the indictment, was the amount recovered from Gomez Londono's luggage following its search pursuant to the warrant issued February 24, 1976. In addition, the same search disclosed the weapons which were the subject of the third count of the indictment.

to Title 31 U.S.C. 1103 for the reason that you failed to file a proper report required by Title 31 U.S.C. 1101 upon your departure from this port [New York City] on February 22, 1976, with money...in excess of \$5,000." (A-64)

On or about March 5, 1976, Gomez Londono retained the services of plaintiff Ivan S. Fisher, an attorney at law, for the purpose of representing him in connection with the indictment returned on March 2nd. The end result of their fee negotiations was Gomez Londono's assignment to Fisher of all of his right, title, and interest in the monies seized from him on February 22nd and 24th, 1976 -- which money was then in the custody of the United States Customs Service. A copy of the assignment, which was annexed as an exhibit to plaintiff's motion papers in the court below, is reproduced in the appendix at A-58.

Approximately one month later, on April 2, 1976, the Area Director of the Customs Service addressed a second letter to Gomez Londono -- which, like the first, was returned as undeliverable -- informing him that he had incurred the forfeiture of the \$44,780 found in his luggage as the result of the search authorized by the February 24th search warrant. (A-65)

At no time, however, has the Government commenced a forfeiture proceeding with respect to these seizures.

On November 17, 1976, following a suppression motion in the criminal prosecution before the United States District Court for the Eastern District of New York (Dooling, J.), the District Court granted the motion in its entirety, finding that, on the stipulated facts, Gomez Londono had not at any time committed a violation of 31 U.S.C. §1101.

In substance, the District Court found, under the regulations promulgated pursuant to the statutory authority of the Secretary of the Treasury, Gomez Londono had not yet reached that point of departure at which the relevant report was required to be filed. Accordingly, no prosecution for the failure to file the report of the international transportation of monetary instruments in excess of \$5,000 could lie.

In addition, the District Court found that, as a matter of law, the defendant had committed no violation of 18 U.S.C. §1001. Because the facts conclusively established as a matter of law, that no offense had been committed, the District Court concluded that the search warrant issued on February 24, 1976, upon the very same

facts, could not have lawfully issued, and, thus, suppressed all of the evidence obtained by Customs agents in their searches of the person and possessions of Henry Gomez Londono.*

Pursuant to 18 U.S.C. §3731, the Government appealed the District Court's suppression order. However, the Government specifically eschewed any appeal of the District Court's conclusions respecting Gomez Londono's criminal liability under 31 U.S.C. §1101 and 18 U.S.C. §1001, explaining that "the United States does not challenge the first two of the [District] Court's rulings" -- the finding that there was no violation of the currency reporting statute, 31 U.S.C. §1101, and, second, the determination that there was no violation of 18 U.S.C. §1001. (Government's Brief, at 8)

Nevertheless, this Court reversed the District Court's suppression order upon the ground that the warrant was properly issued, in spite of the later determination by Judge Dooling that no violation of the currency reporting statute or §1001 of Title 18 had been committed. Id., 553

* These analytical underpinnings of the District Court's determination may be found in the Court's opinion, reported at 422 F. Supp. 519 (E.D.N.Y. 1976).

F.2d at 805. It should be noted that the ultimate disposition of that case does not in any way affect the issue now before the Court in the context of the instant case.

B. Jeopardy Assessment and the Instant Suit

On December 1, 1976, following the granting of Gomez Londono's suppression motion, the IRS, pursuant to 26 U.S.C. §6815, terminated Gomez Londono's taxable year and filed a jeopardy assessment in the amount of \$50,925.25.
(A-60)

On December 8, 1976, the instant action was commenced by plaintiff Fisher under the authority of 26 U.S.C. §7426.

The factual allegations submitted in support of Fisher's complaint were simple and direct: contending that Gomez Londono had assigned him all of his right, title, and interest in the monies seized from him, in a written instrument executed on March 5th, 1976, Fisher argued that IRS had wrongfully levied against the money seized because, at the time of the jeopardy assessment, the taxpayer -- Gomez Londono -- no longer retained any right, title or interest in the money.

Thus, the Government, in effect, had endeavored to satisfy Gomez Londono's tax liability with assets now belonging to Fisher. Fisher thus sought to enjoin enforcement of the levy, and to compel the return of the money.

Following submission of more detailed factual affidavits (e.g., Plaintiff's Supplemental Affidavit, Appellant's Appendix at A-32), both parties moved for summary judgment. The Government contended, inter alia, that the Assignment of Claims Act, 31 U.S.C. §203, rendered the assignment null and void as against the Government, irrespective of its effectiveness between Gomez Londono and Fisher. On this issue, the District Court granted the government summary judgment. It is that issue, and that issue alone, which is now before this Court.*

* The Court below did not reach the issue of whether the assignment sufficed to fully and presently divest Gomez Londono of all his right, title, and interest in the seized money. Rather, assuming that to be the case, arguendo, the court disposed of the motions for summary judgment under 31 U.S.C. §203. Similarly, for the purposes of this appeal, we treat the assignment in like fashion.

ARGUMENT

THE DISTRICT COURT ERRED IN HOLDING THAT THE ASSIGNMENT OF CLAIMS ACT VOIDED, AS AGAINST THE GOVERNMENT, THE ASSIGNMENT BY GOMEZ LONDONO TO FISHER, OF CURRENCY THEN IN THE POSSESSION OF THE UNITED STATES.

The focus of this appeal is the extent to which rights to property in the temporary custody of the United States may be freely alienated during the period of the Government's possession in a manner which will bind the Government with respect to the transfer.

Thus, the dispositive issue of law in this case is whether such a transfer conveys the right to assert a claim against the property itself or merely a claim "upon the United States." Only in the latter event is the conveyance an assignment which runs aroud of the Anti-Assignments Act, 31 U.S.C. §203:

All transfers and assignments made of any claim upon the United States,...whether absolute or conditional, and whatever may be the consideration therefore,... except as hereinafter provided, shall be absolutely null and void, unless they are freely made and executed in the presence of at least two attesting witnesses, after the allowance of such a claim, the ascertainment of the amount due, and the issuing of a warrant for the payment thereof. Id.

In the instant case, the resolution of this issue turns upon the nature of the interest, if any, acquired by

the United States by and through its seizure of approximately \$56,000 from Gomez Londono on February 22nd and 24th, 1976, and its expressed declaration of its intention to forfeit the seized currency on March 2nd and April 2nd, 1976.

To the extent that the Government's seizure of the currency under the peculiar circumstances of this case made it custodian of the property and conferred upon it no further proprietary interest, Gomez Londono's March 5, 1976 assignment of the money to Fisher as and for an attorney's fee transferred a claim against the property itself, not upon the United States. The Anti-Assignments Act then, is no bar to the maintenance of this action. Accordingly, our threshold inquiry is the legal effect of the Government's seizure of the currency from Gomez Londono.

The chronology of events is important here, and, thus, a sequence of the relevant events giving rise to this litigation bears reiteration at this juncture:

-- February 22, 1976: \$11,004 in currency is seized from the person of Gomez Londono immediately prior to his arrest.

-- February 24, 1976: pursuant to a search warrant, United States Customs agents seize

\$44,780 from Gomez Londono's luggage.

-- March 2, 1976: the United States unsuccessfully attempts to notify Gomez Londono of its intention to forfeit the \$11,004 seized from his person on February 22nd.

-- March 2, 1976: Gomez Londono is indicted for, inter alia, transporting \$44,780 in currency, in violation of 31 U.S.C. §1101.

-- March 5, 1976: Gomez Londono assigns to Ivan S. Fisher all of his right, title and interest in all of the currency seized from his person and possessions on February 22nd and 24th, 1976.

-- April 2, 1976: the United States unsuccessfully attempts to inform Gomez Londono that he has incurred the forfeiture of the \$44,780 found in his suitcases pursuant to the search warrant issued and executed on February 24, 1976.

-- November 17, 1976: the District Court grants Gomez Londono's suppression motion.

-- December 1, 1976: IRS assesses approximately \$51,000 in income taxes claimed to be due and owing from Gomez Londono, and files this jeopardy assessment..

The mere seizure of property by the United States does not, of course, without more, confer upon the Government any right or incident of ownership, except insofar as such a right may be asserted upon the grounds that the property seized is contraband or otherwise forfeitable or that the property may be applied against the tax liabilities of its owner at the time the tax liability is assessed. In all other circumstances, the Government's possession is mere custodianship.

Because it divests the owner of property seized of no incident of ownership except the right of immediate possession, the transfer of interest from the owner to a purchaser or assignee during the period of the Government's possession conveys no claim against the United States but, rather, a right to claim the property itself, the assertion of which does not fall within the proscription of the Anti-Assignments Act, 31 U.S.C. §203. United States v. \$22,993 in United States Currency, 332 F. Supp. 1227 (E.D. La. 1971).

Here, the money seized by the United States was not contraband, United States v. San Juan, 545 F.2d 314 (2nd Cir. 1976); United States v. United States Coin and Currency, 401 U.S. 715 (1970); United States v. \$125,882 in United States Currency, 286 F. Supp. 643 (S.D.N.Y. 1968).

Nor had Gomez Londono committed any offense rendering these currencies subject to forfeiture. United States v. Gomez Londono, 422 F. Supp 519 (E.D.N.Y. 1976), rev'd on other grounds, 553 F.2d 805 (2nd Cir. 1977). Accordingly, Gomez Londono's alienation of his right, title and interest in the monies seized from him was a valid assignment as against the Government, because it neither conveyed nor purported to convey any claim "upon the United States".

Under precisely analogous circumstances, the United States District Court for the Eastern District of Louisiana has expressly so held. In United States v. \$22,993 in United States Currency supra, 332 F. Supp. at 1227, IRS agents seized approximately \$23,000 in currency along with an automobile on March 4, 1967. In June of that year, the Government commenced forfeiture proceedings because of various alleged violations of the Internal Revenue laws.

On December 12, 1967, the owners of the automobile and the money found therein intervened in the action and asserted claims for the return of the money. On January 20, 1971, these claimants assigned to their attorneys \$20,000 of the approximately \$23,000 originally seized, in consideration for legal services rendered them. Four months later, the IRS made a jeopardy assessment in excess of \$100,000 against the original claimants. Finally, in June, 1971, the attorney-assigignees moved to internene in the forfeiture proceedings, asserting their claims for \$20,000.

Because the statutes purportedly authorizing the seizure were later found unconstitutional in United States Coin and Currency, supra, 401 U.S. at 715, the District Court held that the Government's attempted forfeiture could not succeed -- a fact no different in legal affect from the District Court disposition in United States v. Gomez Londono, supra, (422 F. Supp. 519), to the effect that Gomez Londono had not, in fact, committed the offense occasioning forfeiture under 31 U.S.C. 1102.*

* The Court below suggested that it was difficult to determine to what extent the ultimate outcome in United States v. \$22,993 in United States Currency was determined by the fact that "the seizure [there] had been made under a statute that was unconstitutional...and its seizure provisions unenforceable in consequence..." (App. Appendix at A-11). It is respectfully submitted that this is no basis for distinguishing \$22,993 from the instant case. There, the court found that the offense occasioning forfeiture could not

(footnote continued on following page)

Finding that the Government did not acquire any ownership interest in the seized property, the District Court held that the Anti-Assignments Act did not bar the right of the assignee-attorneys to obtain recovery of the money in question:

'ince the United States was not the owner of the property, Lane and Lewis [the assignors] were not making claims against the United States when they intervened in the forfeiture proceeding. They were asserting claims upon the res itself. They could therefore, assign their ownership interest in the seized property without complying with the assignment of claims act, 31 U.S.C. §203. That Act deals with 'all transfers and assignments made of any claim upon the United States.' [emphasis supplied] Since the United States was not the owner of the property when the assignment was made, the act was inapplicable. United States v. \$22,993 In Currency, supra, 332 F. Supp. at 1279.

Similarly, here, because the Government, through its seizure, acquired no ownership interest in the funds seized, as it thus acquired no right to retain the money until -- at the earliest -- its jeopardy assessment nine full months after the assignment in question. It thus is bound to recognize the substitution of one claimant of the property for another created by the terms of the assignment. The Anti-Assignments Act, 31 U.S.C. §203, is, thus,

(footnote continued from previous page)

be committed as a matter of constitutional law; here, the District Court held in Gomez Londono, supra, that the offense occasioning forfeiture was not committed as a matter of law. It is hard to see what difference there is in legal effect between these holdings.

inapposite in the context.

Nor did the notices of forfeiture of March 2 and April 2, 1976 in any way alter or affect the rights of the parties. The Government's bare assertion of an intention to pursue forfeiture proceedings, no more than the actual seizure of the currency itself, conveyed no property interests or right of ownership to the United States.

To be sure, where property is forfeited, title to the property generally vests in the United States as of the commission of the offense occasioning the forfeiture:

The right to the property then vests in the United States, although the title is not perfected until judicial condemnation...the condemnation when obtained relates back to that time and avoids all intermediate sales and alienations..United States v. Stowell, 133 U.S. 1 (1889). (emphasis added)

But, here, the offense which would have given rise to the forfeiture was not committed; thus, title never passed to the United States. United States v. Gomez Londono, *supra*, 422 F. Supp. 519.

It is of no particular moment that the determination of this issue in Gomez Londono did not occur until November 17, 1976, in the context of the District Court's memorandum opinion granting the suppression motion. This is so because the issue here is whether the assignment conveyed a claim against the United States; accordingly, it matters not that

the Government intended to acquire a proprietary interest in the money through forfeiture. What mattered only is that it did not acquire any such rights, nor may it acquire such rights in the future, because, as a matter of law, the offense giving to rise to forfeiture was not committed. Indeed, under principles of issue preclusion, the Government is now, in fact, estopped from asserting the contrary.

Thus, under the peculiar circumstances of the instant case -- where forfeiture is legally foreclosed -- the Government asserted no legitimate claim to permanent possession until its December 1, 1976 jeopardy assessment, and, accordingly, the assignment between Gomez Londono and Fisher, executed nine months earlier, did not fall within the prohibition of the Anti-Assignments Act.

Relevant in this connection is a review of what the Fifth Circuit has regarded as extremely "distressful" litigation revolving around the ownership and disposition of the weapons involved in the assassination of President Kennedy and the murder of Dallas Police Officer Tippett. Following the assassination, the weapons were seized by law enforcement authorities and ultimately came into the possession of the Government and, in particular, the Warren Commission. While the weapons were in the possession of the Government, Marina Oswald, widow of Lee Harvey Oswald, assigned her right, title, and interest in these firearms

to a weapons fancier and would-be impressario, one King. Some months thereafter, Congress enacted special legislation entitling the Government to perpetual possession of the weapons.

In United States v. One 6.5 Mm. Mannlicher-Carcano Military Rifle, 250 F. Supp. 410 (N.D. Tex.), rev'd sub nom., King v. United States, 364 F.2d 235 (5th Cir. 1966), the Government initiated forfeiture proceedings against the rifle used in the assassination on the theory that Lee Harvey Oswald's irregular purchase of the weapon had "caused" his vendor to make a false report regarding the sale of the weapon, in violation of 15 U.S.C. §903(d) and 26 C.F.R. §177.51(c). Under this analysis, the weapons were forfeitable to the Government as of the date of the vendor's innocently false report, by virtue of 15 U.S.C. §905(d). Accordingly, the Government could successfully withstand King's claim for compensation under the doctrine of United States v. Stowell, supra.

But the Fifth Circuit, reversing the District Court, held that the weapons were not subject to forfeiture, predicating this finding upon the ground precisely analagous to those supporting the granting of the suppression motion in United States v. Gomez Londono, supra: to wit, the failure of the Government to establish that the offense occasioning

forfeiture had been committed.

The result in King I paved the way for further litigation in King's district of residence to secure compensation for the taking of the weapons accomplished through Congressional enactment of special legislation entitling the Government to their permanent possession.

In King v. United States, 292 F. Supp. 767 (D. Colo. 1968) (King II), the Government resisted King's claim for just compensation on, among other grounds, the argument that the assignment by Marina Oswald to King of her right, title, and interest to the weapons in question was void as against the Government under the Anti-Assignments Act. The Court held, however, that the Act was no bar to King's assertion of a claim for just compensation. The District Court found that the Government's acquisition of the weapons constituted a mere custodianship until enactment of Public Law 89-318, many months after the assignment by Mrs. Oswald to King. Thus, the Court concluded, the Government did not acquire a property interest in the weapons -- its "taking" was not "taking with intent to keep" -- until the enactment of the special Condemnation

Law, P.L. 89-318, entitling the Government to permanent possession of the weapons.*

Thus, in many, although not all, relevant aspects, the King litigation bears a striking resemblance to the matter now at hand. In King, as in the instant case, the Government took possession of property, not contraband per se. There, as here, the Government was precluded from prosecuting a successful forfeiture action against the property because of its inability to demonstrate that the offense giving rise to the forfeiture had been committed.

There, as here, an assignment of property then in the hands of the Government was made after the acts which would have given rise to forfeiture, had forfeiture been appropriate, and before action had been taken by the Government to protect its interest in the property in question: In King, the enactment by Congress of special legislation.

* In King, equivocal documentary evidence tended to show an intention on the part of the Government to return the weapons to Mrs. Oswald following the completion of the Warren Commission investigation, although this is not entirely clear. In the instant case, it is to be noted, Government counsel, in United States v. Gomez Londono, supra, informed counsel for Gomez Londono by letter of his agreement to participate in a stipulation that the money seized need not be retained as evidence in the criminal case based upon counsel's willingness to accept the admissability of a photographic facsimile of the money, in the event that the money itself would have been admissable. See Appellant's Appendix at A-62, A-63.

entitling the government to permanent possession of the weapons in question; here, the jeopardy assessment of December 1, 1976. Accordingly, here as in King II, the Anti-Assignments Act can be no bar to plaintiff's recovery, and, thus, no proper basis for the granting of summary judgment to the Government.

It follows from the King litigation and United States v. \$22,993 in United States Currency, supra, that the Government's assertions of an intention to forfeit money seized from Gomez Londono in the instant case on March 2, 1976 (the money seized from Gomez Londono's person) and, again, on April 2, 1976, (the money later discovered in his suitcase pursuant to the warrant issued on February 24, 1976), are inapposite to the analysis because, in fact, the Government had, as of the time of the assignment, and has now, no legitimate claim of forfeiture to pursue, irrespective of its intentions.

But even assuming, arguendo, that these notices of intent to forfeit somehow triggered a divestiture of title to the monies seized from Gomez Londono in favor of the Government, this displacement of ownership interest did not, in any event, bring the assignment within the proscription of 31 U.S.C. §203.

In developing the contrary proposition, the District Court, upon concluding its analysis of the authorities discussed supra, reasoned that:

The cases that have recognized a transfer of interest are, then, cases in which the Courts held that property interests can be transferred even when the property is in the government's possession, if the government asserts no rival claim of right that predates or is coincident with its taking the property into its possession. Where it is clear that the government correctly asserts a right to forfeit property that it has seized, a later attempted transfer of the property or of the rights to its proceeds is ineffective under 31 U.S.C. [§] 203.

Fisher v. United States, supra, (Appellant's Appendix at A-14).

But even assuming, arguendo, the correctness of this analysis, it still does not avail the Government, given the factual context of the present case. For here, the Government made separate assertions respecting its purported power to forfeit the monies seized from Gomez Londono. Even assuming that the March 2nd notice of forfeiture of \$11,004 represented a "claim of right that pre-dates or is coincident with its [the government's] taking the [money]...into its possession," it at best forecloses the plaintiff's claim to \$11,000 of the approximately \$56,000 in currency seized from Gomez Londono.

The second notice of forfeiture, regarding the approximately \$45,000 seized from Gomez Londono's luggage on February 24th, was not forthcoming until April 2, 1976, nearly a month after the March 5, 1976 assignment. Thus, to regard the notices of forfeiture as the analog in the instant case of the enactment of special condemnation legislation in King II only forecloses, at most, \$11,000 of plaintiff's \$56,000 claim.*

Nor may the District Court's analysis be saved through an attempted application of the doctrine developed in United States v. Stowell, supra; that is to say, upon the argument that the notice of forfeiture, like the ultimate finding of judicial condemnation in a forfeiture proceeding, relates back to the date of the commission of the offense occasioning the forfeiture and vests title -- or at least a claim to title -- to the property in Government as of that date. The Stowell doctrine under any circumstances is simply inapposite in the present case.

The rule announced in Stowell is one of general

*We continue to maintain, of course, that the notices of forfeiture and the Congressional Legislation in King II were not at all analogous because the legislation in King properly conferred upon the Government an absolute right to permanent possession; notices of forfeiture in the instant case had no such effect.

application; however, where the statute under which the Government asserts its right to forfeiture either does not mandate forfeiture or provides the Government with an election of remedies, then the forfeiture dates not from the time of the commission of the offense giving rise to the claim of forfeiture but, rather, from the point in time at which the Government makes its election to forfeit.

United States v. Grundy, 7 U.S. (3 Cranch) (1806);

United States v. 1,960 Bags of Coffee, 12 U.S. (8 Cranch)

398 (1814); Caldwell v. United States, 49 U.S. (8 How.)

366 (1826); Stout v. Greene, 131 F.2d 995 (9th Cir. 1943).

Here, the statute under which forfeiture was sought, 31 U.S.C. §1102, is part of a comprehensive legislative scheme concerning the regulation of international financial transactions. The forfeiture section itself provides that when monetary instruments are in the process of transportation in violation of 31 U.S.C. §1101(a), they are "subject to seizure and forfeiture to the United States." 31 U.S.C. §1102(a).

Because the statute concerns the forfeiture of property which is not contraband, United States v. San Juan, supra, United States v. \$125,882 in United States Currency, supra, it is to be strictly and narrowly construed, Mayo v. United States, 413 F. Supp 160, 162 (E.D. Ill. 1976),

United States v. Five Gambling Devices, 252 F.2d 210
(7th Cir. 1958).

By its own terms, it merely gives the Secretary of the Treasury the option of forfeiture, and its legislative history indicates as well that its purpose was to provide for discretionary forfeiture. See 1970 U.S. Code Cong. and Adm. News 4394, 4408.

Moreover, the next succeeding section of the statute provides for imposition of civil penalties upon those who violate 31 U.S.C. §1101, "except that the liability under this section [§1103] shall be reduced by any amount actually forfeited under §1102 of this title [31 U.S.C. §1102]." 31 U.S.C. §1103.

Thus, the remedies of forfeiture and civil liability provided in 31 U.S.C. §§ 1102 and 1103 are elective and mutually exclusive to the extent that forfeiture and civil liability may not be exacted with respect to the same monetary instruments. Accordingly, the statutory scheme involved here is no different in terms of its provision of an election of remedies than was the statute construed in United States v. Grundy, *supra*. Thus, the doctrine promulgated in Stowell is, under any

construction of the facts, inapposite in the present context.

Here, rather, the divestiture of right, title, and interest incident to forfeiture is effective not at the time of the commission of the offense but at the time of the Government's election to forfeit. Thus, here, contrary to the opinion of the District Court, summary judgment could not be granted to the Government at least to the extent of the \$44,780 seized from Gomez Londono's luggage, which forfeiture was not noticed until April 2, 1976, 28 days after its assignment from Gomez Londono to Fisher.

Finally, and, ultimately, the District Court's analysis rested upon the policy considerations underlying 31 U.S.C. §203.

The District Court wrote:

Whatever may be the general validity of the distinction between claims against the United States and claims to property in the possession of the United States, Gomez Londono's attempted transfer of interest is within the prohibition of 31 U.S.C. [§] 203. The transfer involves just the risks of double-claiming and controversy that the statute was meant to avoid. That money, from the moment of seizure forward was in evident jeopardy of complete or partial divestiture and it was evidentially recoverable, if recoverable, only through litigation in which, substantively, the defendant would be the United States.

Fisher v. United States, *supra*, (Appellant's Appendix at A-15.)

But, it is respectfully submitted. the risks of "double-claiming and controversv" presented by the instant case are far more theoretical than real, and such risks as there are in no way distinguish the present case from those in which courts have recognized the alienability of rights to property in the possession of the United States.

Gomez Londono, of course, would have no viable claim that the United States wrongfully delivered possession of the money to Fisher; to thus disavow the assignment exposes him to the income tax liability the IRS has assessed against him.

To the extent that the jeopardy assessment itself may be attacked in a future proceeding by Gomez Londono, the risk that such a future action may be maintained is no greater and no less than it is anytime a third party pursues a remedy, as has Fisher, under 26 U.S.C. §7426 in that the taxpayer, himself, may always independantly pursue his statutory remedies challenqing the accuracy of the jeopardy assessment.

And, it bears repeating, the risks of "double-claiming" in the instant case are no different from the corresponding risks in those cases which plainly have recognized the viability, as against the Government, of the assignment of rights to property when the property is

in the government's possession.

Accordingly, for all of the foregoing reasons,
the judgment of the Court below, granting summary judgment
to the United States, should be reversed.

CONCLUSION

THE JUDGMENT BELOW SHOULD BE REVERSED,
AND THE CASE REMANDED.

Respectfully Submitted,

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Index No.

IVAN S. FISHER,

Plaintiff-Appellant,

~~XXXXXXXX~~

against

UNITED STATES OF AMERICA,

Defendant-Appellee.

~~XXXXXXXX~~

ATTORNEY'S
AFFIRMATION OF SERVICE
BY MAIL

STATE OF NEW YORK, COUNTY OF

SS.:

The undersigned, attorney at law of the State of New York affirms: that deponem is

JEFFREY DWIGHT ULLMAN,

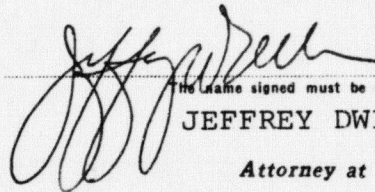
attorney(s) of record for

Ivan S. Fisher, Plaintiff-Appellant.

That on August 22, 1977 deponent served the annexed Appellant's Brief and Appendix on Steven Gelber, Esq., Assistant U.S. Atty. General attorney(s) for Defendant-Appellee, United States of America in this action at U.S. Dept. of Justice, Washington, D.C. 20530 the address designated by said attorney(s) for that purpose by depositing a true copy of same enclosed in a postpaid properly addressed wrapper, in—a post office—official depository under the exclusive care and custody of the United States Postal Service within the State of New York.

The undersigned affirms the foregoing statement to be true under the penalties of perjury.

Dated August 22, 1977



The name signed must be printed beneath

JEFFREY DWIGHT ULLMAN

Attorney at Law

